

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING**



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES ex rel. THOMAS MUNGO,

Petitioner,

COURT OF APPEALS  
NO. 75-2019

v.

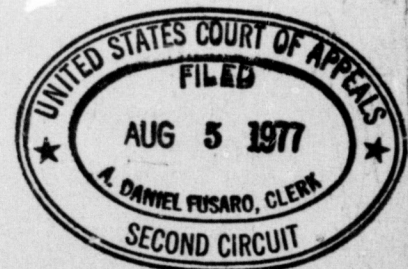
J. EDWIN LAVALLEE, Superintendent of  
Clinton Correctional Facility,

Respondent.  
-----x

PETITION FOR REHEARING

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Attorneys for Petitioner  
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Glen Cove, N.Y. 11542

DAVID W. McCARTHY  
Of Counsel



UNITED STATES COURT OF APPEALS  
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UNITED STATES ex rel. THOMAS MUNGO,

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v.

J. EDWIN LAVALLEE, Superintendent of  
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-----x

PETITION FOR REHEARING

Thomas Mungo, the petitioner herein, respectfully applies, pursuant to Rule 40 of the Federal Rules of Appellate Procedure for a rehearing upon the judgment of this Court dated July 21, 1977 [appendix "A"] affirming the judgment of the District Court.

BACKGROUND

Petitioner was convicted in Supreme Court, Kings County after two separate trials of robbery in the first degree, grand larceny in the first degree and assault in the second degree, (Indictment No. 1096/67) and two counts of possession of weapons as a felony (Indictment No. 1095/67). Petitioner's convictions were affirmed, without opinion in the appellate courts of New York State.

In a petition dated March 16, 1973, Thomas Mungo, acting



pro se, sought the issuance of a Writ of Habeas Corpus. The petition alleged the illegality of petitioner's arrest and the subsequent identification procedures. Said petition was filed on March 23, 1973, and on March 29, petitioner was granted leave to proceed in forma pauperis by District Judge Mark A. Costantino, who also assigned affirmant as counsel.

On March 20, 1974, after submission of memoranda by the respective attorneys and without a hearing, Judge Costantino, in a decision, denied the petition. United States ex rel. Mungo v. LaVallee, 372 F. Supp. 742 (1974).

Notice of appeal was duly filed and on July 16, 1974, application was made to the United States Court of Appeals for the Second Circuit for a certificate of probable cause which was denied on August 16, 1974, (Oakes, J. Frankel and Kelleher USDS). On August 30, 1974, counsel moved to reconsider and vacate the above order. On February 4, 1975, said motion and a certificate of probable cause were granted and counsel was assigned to prosecute the appeal.

On April 30, 1975, the appeal was argued and on July 15, 1975, the District Court was reversed and the case was remanded in an opinion (Moore and Mansfield CJJ, Holder D.J.).

The District Court thereupon granted the Writ and issued an order releasing the petitioner from custody.

Subsequently the respondent sought a writ of certiorari

to the Supreme Court which was granted on July 6, 1976 and the judgment was vacated and "the case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Wolff v. Rice, and Stone v. Powell, 428 U.S. 465 (1976) [appendix "B"].

On July 21, 1977, this Court affirmed the judgment of the District Court "...in light of Stone v. Powell, 428 U.S. 465 (1976)."

#### REASONS FOR GRANTING THE PETITION

In his original brief to this Court, petitioner argued that the State law enforcement officials committed two distinct constitutional errors. The first, which was the basis for this Court's original decision reversing the District Court, was that the petitioner's arrest was without probable cause as interpreted in Whiteley v. Warden, 401 U.S. 560, (1971). In consequence, it was argued, all evidence seized thereby, and the derivative use thereof was forbidden. Two guns and a hat used in an identification confrontation were suppressed, as well as the testimony of witness regarding the identification confrontation in which the hat was prominently displayed on the petitioner. This Court's ruling, as it agreed with the petitioner's argument required, in effect, the dismissal of both the indictment charging the weapons violation and the robbery.



Secondly, petitioner argued that he had been denied Due Process of Law because of the unnecessarily suggestive nature of the confrontation and the testimony thereof adduced at trial. Because of the decision with respect to the first argument, this Court did not reach the Due Process argument:

This result makes it unnecessary to decide the appellant's remaining contention that the station house identification by the witness Monteleone was impermissibly suggestive and unreliable within the due process concept expressed in Neil v. Biggers, 409 U.S. 188 (1972).

(slip opinion at p. 4825-6)  
F. 2d , at p.

The petitioner does not contend that this Court has misapprehended the holding of Stone v. Powell, supra, with respect to the prong of the petitioner for Writ of Habeas Corpus addressed to the weapons indictment which alleges violation of the Fourth Amendment only. However, it is respectfully submitted that the Court in its July 21, 1977 decision overlooked the second prong of the petition as set forth in Point III of petitioner's brief to this Court.

This Court's July 21, 1977 decision specifically affirmed in "light of Stone v. Powell...", the District Court's decision. However the holding of the Supreme Court in Stone v. Powell is succinctly stated at the conclusion of

majority opinion:

In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground the evidence obtained in an unconstitutional search and seizure was introduced at his trial.

428 U.S. at , 49 L.Ed 2d at p. 1088

That the Court addressed itself to contentions of Fourth Amendment violations only cannot be doubted. The Court specifically eschewed abrogation of the much broader exclusionary rule. There was no suggestion whatsoever that the restriction placed upon habeas corpus relief in the Federal Courts would extend as well to Fifth Amendment and Fourteenth Amendment violations deriving from improper identification confrontations.

Consequently, as the July 21st order was issued solely in the context of re-examination of the original decision after Stone v. Powell, and neither decision addressed itself to the Due Process claim, rehearing is required.

Regarding the merits of the Due Process claim, reference is respectfully made to the appellant's brief, Point III which sets forth petitioner's argument regarding the identification procedures used by the State authorities.



Respectfully submitted,

*David W. McCarthy*

David W. McCarthy

MCCARTHY & DORFMAN

Attorneys for the Petitioner

10 Village Square

Glen Cove, New York

11542

(516) 759-1660





# United States Court of Appeals

FOR THE  
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of July one thousand nine hundred and seventy-seve.

Present: HONORABLE LEONARD P. MOORE,  
HONORABLE WALTER R. MANSFIELD,  
Circuit Judges.  
HONORABLE JAMES S. HOLDEN,  
District Judge.

~~Circuit Judges~~

THOMAS MUNGO,

Petitioner,

-against-

J. EDWIN LAVALLEE, Superintendent of  
Clinton Correctional Facility,

Respondent.

75-2019

The action herein having been taken to the Supreme Court of the United States by writ of certiorari and a certified copy of the judgment of the said court having been received and filed, vacating the judgment of this court and remanding the said action to this court for further consideration in light of Stone v. Powell, 428 U.S. 465 (1976),

Upon consideration thereof, it is

ORDERED that the judgment of the district court be and it hereby is affirmed.

*Leonard P. Moore* p.u.s.f.  
Leonard P. Moore, U.S.C.J.

Walter R. Mansfield  
Walter R. Mansfield, U.S.C.J.

James S. Holden  
James S. Holden, District Judge.

A<sup>4</sup>



COPY

SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, D. C. 20543

JUL 9 REC'D

July 6, 1976

Joel Levittes, Esq.  
c/o Louis J. Lefkowitz, Atty. Gen. of New York  
Two World Trade Center  
New York, N.Y. 10047

RE: LaVALLEE, Supt., Clinton Correctional  
Facility. v. MUMTO, 75-696

Dear Sir:

The Court today entered the following order  
in the above-entitled case:

The motion of the respondent for leave to proceed  
in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Wolff v. Rice, \_\_\_ U.S. \_\_\_ (1976) and Stone v. Powell, \_\_\_ U.S. \_\_\_ (1976).

cc opin. in 75-1055 & 74-1222 Very truly yours,  
to be sent as soon as prtd.

Michael Rodak, Jr., Clerk  
By

*Helen Taylor*  
Helen Taylor (Mrs.)  
Assistant Clerk

David W. McCarthy, Esq.  
McCarthy & Dorfman  
Suite 310 - 1527 Franklin Ave.  
Mineola, N.Y. 11501

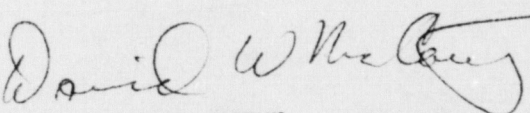
STATE OF NEW YORK)  
SS.:  
COUNTY OF NASSAU )

Helana Coletta being duly sworn, deposes and says:  
deponent is not a party to the action, is over 18 years of age  
and resides at 232 Ohio Street, Hicksville, N.Y.

On August 3, 1977 deponent served the within Petition  
for Rehearing upon the Attorney General, attorney for Respondent  
in this action, at Two World Trade Center, New York, N.Y. the  
address designated by said attorney for that purpose by depositing  
a true copy of same enclosed in a post-paid properly addressed  
wrapper, in a post office official depository under the exclusive  
care and custody of the United States Postal Service within the  
State of New York.

  
\_\_\_\_\_  
HELANA COLETTA

Sworn to before me this  
3rd day of August, 1977.

  
DAVID W. McCARTHY  
NOTARY PUBLIC, State of New York  
No. 41-4525115  
Qualified in Nassau County  
Registered in Queens Co.  
Commission Expires March 20, 1978



75-2019

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.  
☐ Attorney's Affirmation shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

☐ Individual Verification the being duly sworn, deposes and says: deponent is in the within action; deponent has read and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.  
☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

☐ Affidavit of Service By Mail On 19 deponent served the within attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

The name signed must be printed beneath





UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES ex rel. THOMAS MUNGO,

Petitioner,

v.

J. EDWIN LAVALLEE, Superintendent of Clinton  
Correctional Facility,

Respondent.

PETITION FOR REHEARING

McCARTHY & DORFMAN

Attorneys for **Petitioner**

Office and Post Office Address, Telephone

**Ten Village Square**  
**GLEN COVE, N. Y. 11542**  
**(516) 759-1660**

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Sir:— Please take notice

NOTICE OF ENTRY

that the within is a (*certified*) true copy of a  
duly entered in the office of the clerk of the within named court on

19

NOTICE OF SETTLEMENT

that an order  
settlement to the HON.  
of the within named court, at  
on

of which the within is a true copy will be presented for  
one of the judges

19

at

M.

Dated,

Yours, etc.

**McCARTHY & DORFMAN**

Attorneys for

Office and Post Office Address

**Ten Village Square**  
**GLEN COVE, N. Y. 11542**

To

Attorney(s) for